

Aetna Universal Insurance Sdn Bhd v Ooi Meng Sua

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COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-579
OF 1997

GOPAL SRI RAM, DENIS ONG AND MOHD NOOR JJCA

16 MAY 2001

Labour Law — *Employment — Dismissal — Immediate termination without notice — Respondent attempted to induce other employees to join competitor — Whether conduct undermined business of employer — Whether conduct seriously corrosive of relationship of master and servant to warrant immediate termination of contract of employment*

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The respondent was employed by the appellant as its agent under two contracts. One of the contracts had a clause that entitled the appellant to terminate the relationship by giving 14 days notice. The other contained a clause that provides for termination for cause. The dispute between the parties arose out of a complaint of misconduct against the respondent. It was alleged that the respondent had joined another insurance company and had attempted to induce four other agents to leave the appellant and join another insurance company. The respondent was summarily dismissed by the appellant. The respondent filed action for breach of contract. The judge held his dismissal to be bad and awarded damages. The judge accepted the evidence of the appellant's witnesses who testified about the respondent's attempt to get them to leave the appellant's employment. Nevertheless he went on to hold that the appellant was obliged to give the respondent the two-week notice. The appellant appealed.

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Held, allowing the appeal:

The judge had misdirected himself. Having satisfied himself that the respondent had attempted to induce four other agents to leave the appellant, he ought to have held that misconduct had been proved. Accordingly, he ought to have gone on to hold that the appellant was justified in summarily dismissing the plaintiff. It does not matter that the plaintiff did not himself join another insurance company. Suffice that he made attempts to get other fellow agents to leave. The effect of such conduct would be to undermine the business of the employer. It was a conduct that was seriously corrosive of the relationship of master and servant. It warranted the immediate termination of the contract of employment (see pp 506A–B, E–F).

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[Bahasa Malaysia summary

Responden telah diambil bekerja oleh perayu sebagai ejennya di bawah dua kontrak. Salah satu daripada kontrak tersebut mempunyai satu klausa yang membolehkan perayu menamatkan hubungan tersebut dengan memberikan notis 14 hari. Satu lagi mengandungi satu klausa yang memperuntukkan penamatan dengan sebab. Pertikaian antara pihak-pihak tersebut timbul daripada satu aduan

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- A salah laku terhadap responden. Adalah dikatakan bahawa responden telah menyertai syarikat insurans lain dan telah cuba mempengaruhi empat orang ejen yang lain untuk meninggalkan perayu dan menyertai syarikat insurans yang lain. Responden telah dipecat terus oleh perayu. Responden telah memfailkan tindakan untuk pelanggaran kontrak. Hakim memutuskan pemecatan beliau adalah salah dan mengawardkan ganti rugi. Hakim menerima keterangan saksi-saksi perayu yang memberikan keterangan tentang percubaan responden mempengaruhi mereka untuk meninggalkan pekerjaan dengan perayu. Namun begitu beliau memutuskan bahawa perayu diwajibkan memberi responden notis dua minggu. Perayu telah membuat rayuan.
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- C **Diputuskan**, membenarkan rayuan tersebut:
Hakim telah tersalah arah. Setelah berpuas hati bahawa responden telah cuba untuk mempengaruhi empat orang ejen tersebut untuk meninggalkan perayu, beliau sepatutnya memutuskan bahawa salah laku tersebut telah dibuktikan. Sewajarnya, beliau sepatutnya memutuskan bahawa perayu adalah betul dalam memecat terus plaintif. Ia tidak kira bahawa plaintif sendiri tidak menyertai syarikat insurans yang lain. Adalah mencukupi beliau telah membuat percubaan untuk mempengaruhi ejen-ejen lain untuk meninggalkan perayu. Kesan daripada perbuatan sedemikian akan menjejaskan perniagaan majikan. Ia adalah satu perbuatan yang amat menjejaskan perhubungan majikan dan pekerja. Ia mewarankan pemecatan serta-merta kontrak pekerjaan (lihat ms 506A–B, E–F).
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Notes

- F For cases on dismissal generally, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 813–832.

Cases referred to

- G *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339 (refd)
Francis v Municipal Councillors of Kuala Lumpur [1962] MLJ 407 (refd)
Menon v Brooklands (Selangor) Rubber Co Ltd [1968] 1 MLJ 15; [1968] 2 MLJ 186 (refd)
Motilal v Guthrie Agency (M) Ltd [1968] 1 MLJ 211 (refd)
- H *Panchaud Freres SA v Etablissement General Grain Co* [1970] 1 Lloyd's LR 53 (refd)
Sinclair v Neighbour [1966] 3 All ER 988 (refd)
SR Fox v Ek Liong Hin Ltd [1957] MLJ 1 (refd)
Wickman Machine Tool Sales Ltd v Schuler AG [1972] 1 WLR 840 (refd)
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Appeal from: Civil Suit No 22–163 of 1992 (High Court, Pulau Pinang)

Robert Lazar (G Rajasingam with him) (Shearn Delamore & Co) for the appellant.

Surinder Singh (Ong & Manecksha) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court):. This case has to do with an action for breach of contract. The facts are fairly straightforward and are easily told.

The defendant (who is the appellant before us) is an insurance company. The plaintiff (respondent in the appeal) was employed by the appellant as its agent under two contracts. One of these was an agency contract. The other was an agency manager's contract. The two contracts are to be read together. Indeed, a clause in one of them says as much. One of the contracts has a clause that entitles the appellant to terminate the relationship by giving 14 days notice. The other contains a clause that provides for termination for cause.

The dispute between the parties arose out of a complaint of misconduct against the respondent. Specific allegations were made. One of these was that the respondent had joined another insurance company. Another was that he had attempted to induce four other agents to leave the appellant and join another insurance company. The respondent replied through his former solicitors, denying the allegations. He was nevertheless summarily dismissed. He filed an action for breach of contract. The judge held his dismissal to be bad and awarded damages. This appeal is directed against that judgment.

The first point to be noticed is that the trial judge accepted the evidence of the defendant's witnesses who testified about the plaintiff's attempt to get them to leave the defendant's employment. He said so twice in his judgment. But he nevertheless went on to hold that the defendant was obliged to give the plaintiff the two-week notice. Was he right in doing so? I do not think he was.

We are here concerned with the position at common law. It is materially different from industrial law. In industrial law, for example, a workman may obtain specific performance of his contract of employment through an order of reinstatement. But the common law and the ordinary rules of equity working in tandem do not provide such relief, save in the rarest of cases. See *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407.

The common law governing the relationship of master and servant is clear. It is contained in the following propositions.

- (1) A master is entitled to summarily dismiss his servant at any time, notwithstanding any contractual provision requiring the giving of notice of termination.
- (2) If a dismissal is challenged, the burden is on the master to justify it: *SR Fox v Ek Liong Hin Ltd* [1957] MLJ 1.
- (3) If the master fails to justify the dismissal, then he must pay the servant such damages as are just in lieu of proper notice.

- A (4) A master who has given no reason or a bad reason for summarily dismissing his servant may, at the trial of the action, justify the dismissal for a good reason. See *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339.
- B (5) But there may be circumstances in which a court may estop a master from relying on new grounds to sustain a dismissal made on invalid grounds. Here, I think it sufficient to quote the example given by Lord Denning MR in *Panchaud Freres SA v Etablissement General Grain Co* [1970] 1 Lloyd's LR 53 at p 56:
- C It is similar to the rule that if a man dismisses a servant on one ground, he is not confined to that ground. If he afterwards find another ground justifying his dismissal, he can rely on that too. But this rule is subject to the qualification that a man may by his conduct preclude himself from setting up the later ground. We had, a little while ago, a case where a man was dismissed for one particular piece of dishonesty. At the trial the employer realised that he would not succeed in proving that particular dishonesty. So, during an adjournment, he got evidence of another piece of dishonesty and tried to raise it. But we did not allow it. He had fought the case on the earlier ground, and it would not be fair to allow him to rake up another ground at that stage. It is not, strictly speaking, a case of waiver but of estoppel by conduct.
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- E (6) An express contractual mechanism, in the absence of it forming a comprehensive code for termination, does not oust a party's common law right of repudiation. That was made clear by Lord Denning MR in *Wickman Machine Tool Sales Ltd v Schuler AG* [1972] 1 WLR 840 at p 852 in a judgment affirmed by the House of Lords on further appeal:
- F Although cl 11(a) would appear to provide for the circumstances in which the agreement can be determined, I do not think it should be treated as a comprehensive code. Take a case where one party repudiates the contract and the other accepts it. That is not within cl 11(a). Take another case when one party commits a breach which was not capable of remedy, as if Wickman Sales disclosed important trade secrets to a rival. I do not think that Schuler would have to give a 60 day notice under cl 11(a). In short,
- G if one party or the other was guilty of a breach which went to the root of the contract and was not capable of remedy, then the injured party could treat himself as discharged from further performance. But, if it is a breach which does not go to the root of the contract — and it is only a material breach which is capable of remedy — then cl 11(1)(a) does apply.
- H (7) At common law, it is irrelevant that the master has not heard the servant in his defence before terminating his services. What is important is whether the proved or admitted facts disclose a breach of contract, for if they do, the master need not pay damages: *Menon v Brooklands (Selangor) Rubber Co Ltd* [1968] 1 MLJ 15; [1968] 2 MLJ 186.
- I (8) A master is entitled to summarily dismiss his servant for misconduct. This is because misconduct goes to the root of the contract and generally has the effect of destroying the relationship of trust and

mutual confidence that is essential in a master-servant relationship: *Motilal v Guthrie Agency (M) Ltd* [1968] 1 MLJ 211; *Menon v Brooklands (Selangor) Rubber Co Ltd*.

Applying the foregoing propositions to the present instance, I am of the view that this is a case where the judge has misdirected himself. Having satisfied himself that the plaintiff had attempted to induce four other agents to leave the defendant, he ought to have held that misconduct had been proved. Accordingly, he ought to have gone on to hold that the defendant was justified in summarily dismissing the plaintiff. If the judge needed authority, he would have found it in the judgment of Sellers LJ in *Sinclair v Neighbour* [1966] 3 All ER 988 at p 89:

This case turns on the attitude which the employer could properly take to that conduct. It seems that the employee not infrequently used to telephone to the employer. The employer said the employee did it too often, and so he did not think he would do it again over this matter. He took the money without asking. He thought that, if he had asked, the employer might have lent him the money for some purposes, but that if he had told him it was for betting the employer would not have agreed. He would not have permitted it. Whether such taking of the money would have resulted in a conviction for larceny or for dishonest misappropriation of the money does not arise, in my view. On these facts a jury might have taken the view that they would not convict; *but I do not think that it matters whether the conduct is to be described as dishonest misconduct or not. Views might differ. It was sufficient for the employer if he could, in all the circumstances, regard what the employee did as being something which was seriously inconsistent — incompatible — with his duty as the manager in the business in which he was engaged.* (Emphasis added.)

So too here, it does not matter a jot that the plaintiff did not himself join another insurance company. Suffice that he made attempts to get other fellow agents to leave. The effect of such conduct would be to undermine the business of the employer. It is conduct that is seriously corrosive of the relationship of master and servant. It warranted the immediate termination of the contract of employment. To require a master in these circumstances to pay damages — as the judge ordered — is to add insult to serious injury.

We were repeatedly urged by the plaintiff's counsel during the course of argument that there ought to have been a proper disciplinary inquiry before the dismissal. In my view, the short answer to that argument is that there is no such requirement at common law: *Menon v Brooklands (Selangor) Rubber Co Ltd*.

Having given this matter my most anxious consideration, I am driven to the conclusion that this appeal must succeed. I would accordingly set aside the order of the learned judge and dismiss the plaintiff's suit. The costs here and in the court below must be borne by the plaintiff. The deposit in court is to be paid out to the defendant.

Before I conclude this judgment, there is an observation I would make. It has to do with the conduct of the appellant's solicitors. Now, when the dispute between the parties first arose, the present solicitors for the defendant acted for the plaintiff. But they did not appear for anyone at the

- A trial. Now they appear for the defendant in this appeal after having taken instructions from the plaintiff. Mr Robert Lazar sought to defend what has been done by his firm. He said that the instant solicitors did not object to what had happened. I think that is irrelevant. Just because the plaintiff's present solicitors lacked the initiative to take the point does not mean that what was done was right. It was plainly wrong. I said so during argument.
- B The defendant's solicitors were privy to confidential information given to them by their erstwhile client, the plaintiff. The fact that they did not use that information against him by appearing against him at the trial is irrelevant. There are other obvious dangers such as having access to information from the client and using it at the appellate stage. If that is not an abuse of a solicitor's position, I really do not know what is. Since there
- C is no complaint of a miscarriage of justice arising out of this conflict of interest, I am minded to say no more about this unfortunate state of affairs.

My learned brothers Denis Ong Jiew Fook and Mohd Noor Ahmad JJCA have read this judgment in draft and have expressed their agreement with it.

- D *Appeal allowed.*

Reported by Jafisah Jaafar

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